

BINGHAM

Richard de Bodo  
Direct Phone: +1.310.255.9055  
Direct Fax: +1.310.907.2055  
rich.debodo@bingham.com

September 15, 2014

Daniel E. O'Toole  
Clerk of Court  
United States Court of Appeals for the Federal Circuit  
717 Madison Place, N.W.  
Washington, D.C. 20439  
otoole@cafc.uscourts.gov

**Re: Anticancer, Inc. v. Pfizer, Inc., 13-1056**

Dear Mr. O'Toole:

We represent Respondent Pfizer Inc. in the above-referenced case and are responding to your letter dated August 19, 2014. In that letter, the Court inquired as to whether the joint voluntary dismissal of Appellant's Second Amended Complaint with prejudice divests this Court of Article III jurisdiction.

Appellant AntiCancer responded on August 22, 2014. It asserted that (1) the district court had previously dismissed the patent infringement claims, and (2) the parties' confidential settlement discussions had focused on the remaining contract claims. While acknowledging that the parties' settlement agreement is not before this Court, AntiCancer asserts the parties intended to settle only the contract claims and not the patent infringement claims that are the subject of this appeal, and that therefore, there remains a live controversy for this Court to resolve. The confidential settlement agreement is not in evidence and does not form part of the appeal record.

The Court's inquiry appears to raise an additional matter for consideration. Even if the parties only intended to settle the contract claims, Appellant filed a "Joint Motion and Stipulation of Voluntary Dismissal, with Prejudice" asking the district court to approve the "voluntary dismissal *of the above matter* pursuant to Federal Rule of Civil Procedure 41(a)(1)(ii)." Joint Mot. for Dismissal at 1 (emphasis added). As this Court pointed out, that Joint Motion on its face asked the district court to order that the entirety of "AntiCancer's Second Amended Complaint is dismissed, WITH PREJUDICE." *Id.* at 2. As this Court further noted, the district court obliged and gave the parties the precise dismissal they requested.

Although the parties obviously had not focused on the issue prior to this Court's letter, Appellant's action in voluntarily dismissing the entirety of its complaint with prejudice arguably makes it inappropriate for this Court to render a decision on the district court's previous disposition of its patent infringement claims. Precisely because Appellant stipulated to it, the district court's order dismissing Appellant's full complaint with

Beijing  
Boston  
Frankfurt  
Hartford  
Hong Kong  
Lexington (GSC)  
London  
Los Angeles  
New York  
Orange County  
San Francisco  
Santa Monica  
Silicon Valley  
Tokyo  
Washington

Bingham McCutchen LLP  
The Water Garden  
Suite 2050 North  
1601 Cloverfield Boulevard  
Santa Monica, CA  
90404-4082

T +1.310.907.1000  
F +1.310.907.2000  
bingham.com

Daniel E. O'Toole  
September 15, 2014  
Page 2

prejudice is not on appeal. The district court's order, on its face, appears to resolve all issues in Appellant's second amended complaint, leaving nothing for this Court to decide. As the district court's order stands, any ruling by this Court would appear to be advisory. If Appellant is dissatisfied with the district court's order, Appellant can seek relief from the district court under Fed. R. Civ. Proc. 60(b), and the district court will have discretion whether or not to modify its order.<sup>1</sup> In these circumstances, the prudent course is to dismiss the appeal.

We thank the Court for its consideration.

Respectfully,

By: /s Richard de Bodo  
Richard de Bodo

Bingham McCutchen LLP

*Attorneys for Defendant-Appellee  
Pfizer Inc.*

---

<sup>1</sup> Nothing herein is intended to limit or waive any of Respondent's rights with respect to such a request.